Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1994

THOMAS C. PREVETIRE,
Petitioner-Claimant,

v.

WEYHER/LIVSEY CONSTRUCTORS, INC.,
Respondent-Employer,

and

WAUSAU INSURANCE COMPANY,
Respondent-Carrier.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employee involved in the construction of a steam and electrical power plant, whose primary purpose was to provide power for ship repair work at the Norfolk Naval Shipyard, is a "maritime employee" under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq.?

PARTIES TO THE PROCEEDING

1. Thomas C. Prevetire was the claimant in the proceedings before the Benefits Review Board of the U.S. Department of Labor, and Weyher-Livsey Constructors, Inc., was the employer. The Director of Office of Worker's Compensation Programs in the U.S. Department of Labor noticed its appearance in this claim and supported the position that Prevetire had met the jurisdictional requirements of the Longshore Act.

2. Weyher-Livsey Constructors, Inc., was the appellant in the proceedings before the United States Court of Appeals for the Fourth Circuit, and Thomas C. Prevetire was the Appellee. The Director of Office of Worker's Compensation Programs in the U.S. Department of Labor was also named as Appellee and again supported the position that Prevetire had met the jurisdictional requirements of the Longshore Act.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Thomas C. Prevetire, by counsel, respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-13a) is reported at 27 F.3d 985. The decision of the Benefits Review Board (App., *infra*, 16a-23a) is unreported. The decision of the administrative law judge (App., *infra*, 24a-33a) is unreported.

JURISDICTION

The Court of Appeals entered its judgement on June 29, 1994, and denied a petition for rehearing with suggestion for rehearing *in banc* on October 26, 1994 (App., *infra*, 14a-15a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The pertinent provision of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §902) is reprinted in full at App., *infra*, 34a-35a.

STATEMENT

This case involves a question of jurisdictional coverage under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq., (herein after "Longshore Act" or "LHWCA"). The Petitioner, Thomas C. Prevetire, filed for a claim of disability benefits under the Longshore Act as a result of a work-related injury occurring on October 16, 1986. Prevetire worked as pipefitter for Weyher-Livsey Constructors, Inc. (hereinafter "Employer"). At the time of his injury, Prevetire was involved in the construction of a power plant located in the Norfolk Naval Shipyard. The Employer denied Prevetire's claim on the grounds that his work did not meet the "status" requirement set forth in Section 2(3) of the Longshore Act. 33 U.S.C. §902(3).

A hearing was held before the administrative law judge on December 4, 1989. In his *Decision and Order* dated March 28, 1990, the administrative law judge

determined that Prevetire's work did not have a "realistically significant relationship to traditional maritime activities" and that his duties as a pipe fitter were not "inherently maritime" (App., *infra*, 32a; citing *Conti v. Norfolk & Western Rwy. Co.*, 566 F.2d 890, 895 (4th Cir. 1977)). As such, the ALJ held that Prevetire had not met the status requirement of the LHWCA, and therefore Prevetire's claim for benefits were denied (App., *infra*, 33a).

The Benefits Review Board reversed the Administrative Law Judge's decision, holding that the ALJ "applied improper standards in determining whether claimant is engaged in maritime employment" (App., *infra*, 19a). Instead, the Board relied upon the "integral or essential part" test as set forth in the Supreme Court's decision in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 439 U.S. 40, 45, 107 L.Ed.2d 278, 110 S.Ct. 381 (1989). Accordingly, the Board determined that Prevetire was a "maritime employee" because he was involved in the construction of a power plant

which ultimately provided steam and electricity **essential** to the operation of the shipyard (App., *infra*, 20a-21a; citing *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991)).

The Employer appealed that decision to the Court of Appeals for the Fourth Circuit. On June 29, 1994, the court of appeals reversed the decision of the Benefits Review Board, stating that the Board's "expansive view of maritime employment is inconsistent with the LHWCA and its 1972 Amendments" (App., *infra*, 8a). The court of appeals relied upon *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 84 L.Ed.2d 406, 105 S.Ct. 1421 (1985), and concluded that Prevetire was not a "maritime employee" within the meaning of the Act. 33 U.S.C. 902(3) (App., *infra*, 9a-10a).

Prevetire petitioned the court of appeals for a rehearing with suggestion for rehearing *in banc*. In its Order dated October 26, 1994, Senior Judge Sprouse voted to grant rehearing, and Judge Murnaghan and Judge Harvey, sitting by designation, voted to deny rehearing (App., *infra*, 15a).

A member of the court requested a poll on the suggestion for rehearing *in banc*, and a majority of the judges voted to deny rehearing *in banc* (App., *infra*, 15a).[1]

REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals is in direct conflict with this Court's decision in *Schwalb*. Moreover, the decision of the court of appeals is based upon a misinterpretation of this Court's decision in *Herb's Welding*.

Under the 1972 amendments to the Longshore Act, eligibility for compensation benefits pursuant to a work-related injury depends upon the results of two tests: "status" of the employee, and "situs" of the injury. *Northeast Marine Terminals Co. v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977). The status requirement is imposed by Section 902(3) of the Longshore Act, which provides, in

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[1] Judges Wilkings, William, Michael, and Senior Judge Sprouse voted to rehear the case *in banc*. Chief Judge Ervin, Judges Russell, Widener, Murnaghan, Wilkinson, Niemeyer, Hamilton, Luttig, and Motz voted against rehearing *in banc* (App., *infra*, 15a).

part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . .

33 U.S.C. § 902(3) (1988) (App. *infra*, 34a).

As the parties in the present case do not dispute that Prevetire was injured on a maritime situs in the course and scope of his employment, the question is whether Prevetire was a "maritime employee" within the meaning of the LHWCA.

In denying Prevetire's claim for benefits, the court of appeals relied upon *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 84 L.Ed.2d 406, 105 S.Ct. 1421 (1985). In doing so, the Fourth Circuit Court of Appeals misinterpreted the Supreme Court's decision in *Herb's Welding* and erroneously applied that case to the factually distinguishable situation in the present case.

Claimant Gray in *Herb's Welding* was a maintenance-

welder who worked on an offshore platform used to search for gas and oil. In that case, the Supreme Court reasoned that neither the offshore search for oil and gas nor the platforms used in that process were "inherently maritime" for purposes of coverage under the LHWCA, and therefore, the Supreme Court concluded that claimant Gray was not entitled to compensation benefits. *Id.*, 470 U.S. at 424.

Applying *Herb's Welding* to the present case, the court of appeals wrote:

> Both Gray and Prevetire were construction workers: Gray was a welder who built and replaced pipelines, Prevetire a pipe fitter who helped build and replace a power plant. Neither man built or repaired ships. Neither man loaded or unloaded ships. . . . Gray's welding work and Prevetire's pipe fitting were both far removed from traditional LHWCA activities, such as longshoring. Neither welding nor pipe fitting is an inherently maritime task. (App., *infra*, 9a).

The court's first error in making this comparison between claimant Gray in *Herb's Welding* and Prevetire in the present case is the statement that "[n]either welding nor pipe fitting is an inherently maritime task." It is well settled

that both welding and pipefitting can be considered maritime work when performed as an integral part of the overall ship repair/construction process. For example, in *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1980), *cert. denied*, 454 U.S. 1163 (1982), the Fifth Circuit wrote, "'non-maritime' skills applied to a maritime project *are* maritime for purposes of the 'maritime employment' test of the Act." *Id.*, 650 F.2d at 756, 14 BRBS at 377 (emphasis in original).[2] The fact that the nature of an employee's duties is not altered by a maritime environment

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[2] The Fifth Circuit clarified this rationale in *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (1991). The court made the following analysis:

> [W]hile wireline work can be unconnected with maritime commerce, so too can the unloading and loading, and construction activities that the Court recognizes as the focus of the maritime employment test. For example, an employee might engage in construction activities, but build an airplane instead of a ship. **Nothing intrinsic in any of these activities establishes their maritime nature, rather it is that they are undertaken with respect to a ship or vessel. When the tasks are undertaken to enable a ship to engage in maritime commerce, then the activities become "maritime employment".**

Id., 923 F.2d at 1131 (footnotes omitted).

therefore does not prevent a finding of coverage under Section 2(3). *See generally White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980). To the extent that the court's decision in the present case was based upon the conclusion that Mr. Prevetire's duties as a welder were not "inherently maritime", that finding is clearly inconsistent with well established precedent.

Furthermore, the Fourth Circuit's contrived correspondence between Gray and Prevetire is faulty simply because there is a clear distinction between an oil rig which is not an inherently maritime facility and a shipyard's power plant that provides electricity and steam to the entire shipyard which is an inherently maritime facility. In applying the rationale of *Herb's Welding* to the instant case, the court of appeals placed Prevetire's work into the same ***obviously*** non-maritime class of employment as Gray, and thus, the court's comparison between *Herb's Welding* and the present case is

mistaken.

In this regard, the petitioner fully agrees with this Court's holding in *Herb's Welding*, however, contends that the court of appeals erred in applying that decision to the present case. *Herb's Welding* stands for the proposition that when considering the "status" of employees ostensibly involved in ship loading and unloading, only those employees whose duties are found to be an integral part of the loading and unloading process will be conferred "status" under the LHWCA. The holding in *Herb's Welding,* thus, actually supports coverage in the instant claim when viewed in light of the maritime work involved--the ship repair process--clearly an activity equally maritime to ship loading and unloading. Since the construction of the ship repair facilities' power plant is undeniably integral to the overall ship repair process, "status" must be conferred on Mr. Prevetire.

Specifically, this Court held in *Herb's Welding* that the offshore oil industry in that case did not constitute a

maritime industry. *Herb's Welding*, *supra*, 470 U.S. at 421-422. In the present case, however, the Norfolk Naval Shipyard is involved in the ship repair process, clearly a maritime industry, which has not been disputed by any of the parties. Accordingly, it is clear that *Herb's Welding* does not conflict with the present case, nor should it have been applied here by the court of appeals because it does not have any controlling application. *See also Campbell v. Sonat Offshore Drilling, Inc.*, 797 F.2d 1115, 1121-1122 n.8 (5th Cir. 1992).

Indeed, this distinction was properly noted by Senior Judge Sprouse, who wrote in his Dissent:

> . . . I believe the majority's reliance on *Herb's Welding, Inc. v. Gray,* 470 U.S. 414 (1985), is misplaced. There, the decision denying coverage turned on the Court's view that neither the offshore search for oil and gas, nor the oil industry's use of offshore platforms in that process, had any relation to one of the Act's primary purposes--the protection of shipyard workers whose activities affect the loading or unloading of ships. Here, however, the furnishing of electrical power is closely related to maritime work performed in the shipyard. (App., *infra*, 12a).

Rather than *Herb's Welding*, the court of appeals should have analyzed Mr. Prevetire's "status" consistently with this Court's decision in *Chesapeake & Ohio Rwy. Co. v. Schwalb*, 493 U.S. 40, 107 L.Ed.2d 278, 110 S.Ct. 381 (1989), a decision with which the court of appeals' decision is directly at odds.

This Court in *Schwalb* applied the "integral or essential part" test in determining whether an employee has met the maritime status of the Act;

> In the course of considerable litigation, including several cases in this Court, it has been clearly decided that, aside from the specified occupations, land-based activity occurring within the §903 situs will be deemed maritime only if it is an **integral or essential part** of loading or unloading a vessel.

Schwalb, *supra*, 493 U.S. at 45 (emphasis supplied). In the present case, the majority panel noted the "integral or essential part" test as set forth in *Schwalb* (App., *infra*, 8a); but failed to properly apply it to Mr. Prevetire's employment. In failing to do so, the court of appeals closed

its eyes to the integral relationship between the power produced by the generating plant and the overall ship repair operations at the shipyard.

The electrical power plant which Mr. Prevetire was constructing was inextricably integrated into the ongoing process of the ship repair activity performed at the Norfolk Naval Shipyard. It is true that Mr. Prevetire was not a longshoreman in the traditional sense; he was not unloading a ship, nor was he loading one. His work was, however, critical to the construction of the power plant located within the shipyard. This power plant provided the power, both steam and electricity, used by the shipyard. Without Mr. Prevetire's activity, there would not be a generator to produce power. Without power, each individual department within the shipyard could not perform their duties and all operations and ship repair processes would cease. In this regard, it follows that the generator plant is <u>essential</u> to the entire shipyard operation. Accordingly, it is evident that

under *Schwalb*, Prevetire's duties would be considered "integral or essential" to the operations at the Norfolk Naval Shipyard, and therefore deemed "maritime employment."

In his Dissent, Senior Judge Sprouse reached the same conclusion:

> In my view, the construction of a power plant at the shipyard is also essential to the shipyard's maritime operations, for without electricity and steam, no shipbuilding or repair work could be performed. Prevetire's construction work on the power plant, therefore, was a link in the shipbuilding and ship repair process that was just as essential as the maintenance and repair of machinery used in that process. (App., *infra*, 11a-12a).

Rather than relying upon *Herb's Welding*, the court of appeals should have fully considered this Court's rationale in *Schwalb* to determine whether Mr. Prevetire's duties had an integral relationship to the shipyard's operations. Had the court of appeals done so, it would have reached the proper conclusion, that is the decision in *Schwalb* compels a finding of "status" under the LHWCA in this case.

2. The decision of the court of appeals creates a conflict between the Fourth Circuit and decisions of other circuits, specifically the decisions in *Graziano* and *Hullinghorst*.

The First Circuit discussed the "status" requirement in *Graziano v. General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981). That case involved a maintenance-mason employed by General Dynamics, a corporation engaged in the building and repairing of ships. Graziano's primary duties involved the repair of masonry in shipyard buildings, but also included digging ditches, breaking up concrete, laying cement, grouting, removing asbestos from pipes, repairing boilers and manholes, and cleaning acid tanks. *Id.*, 663 F.2d at 341. There, the court concluded that the language of the 1972 Amendments was broad and suggested an expansive view of coverage, and therefore held that Graziano had met the status requirement of the Longshore Act. *Id.*, 663 F.2d

at 342. That court further noted a line of cases[3] holding that employees involved in the maintenance repair of machinery utilized in the shipbuilding, ship repair, or ship unloading process were covered under the Longshore Act. *Id.*, 663 F.2d at 342.

In finding that claimant Graziano was a "maritime employee" under the LHWCA, the First Circuit relied upon *Price v. Norfolk and Western Ry. Co.*, 618 F.2d 1059, (1980).[4] The *Graziano* court noted that the Fourth Circuit's decision in *Price* was well reasoned and fairly characterized a broad and expansive interpretation of the Act. *Id.*, 663

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[3] *Warren Bros. v. Nelson*, 635 F.2d 552, 556, (6th Cir. 1980); *Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346, 1347 (5th Cir. 1980), *cert. denied*, 452 U.S. 915, 101 S.Ct. 3049, 69 L.Ed.2d 418 (1981); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1220-1221 & n.5 (5th Cir. 1980); *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059, 1061 (4th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir.), *cert. denied*, 439 U.S. 979, 99 S.Ct. 563, 58 L.Ed.2d 649 (1978); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977); *Bradshaw v. McCarthy*, 3 BRBS 195 (1976), *petition for review denied*, 547 F.2d 1161 (3d Cir. 1977).

[4] The decision in *Price* will fully be discussed in Section 3 of this petition, *infra*.

F.2d at 342.

If an individual employed in the maintenance and repair of shipyard buildings is covered under the Longshore Act, then clearly an individual who is employed in the construction of such buildings is also covered. It cannot be contested that the power plant is essential of the overall shipyard operations because the steam and electricity produced by the power plant is critical to all ship repair activities in the shipyard.[5] Therefore, it follows that the construction and maintenance of that power plant is equally critical to the overall operations at Norfolk Naval Shipyard.

In addition, the Fifth Circuit addressed the importance of a broad view of jurisdictional coverage in *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). The

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[5] *See, e.g., Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991), where the Board held that a boiler is an essential facility in shipyard operations, for shipbuilding and ship repair work could not be performed without power.

claimant in *Hullinghorst* worked for a sub-contractor as a scaffolding carpenter at a port facility. The only work performed by the Hullinghorst employees was to erect scaffolds wherever needed in the port facility. Although the claimant in *Hullinghorst* did not participate directly in the loading, unloading, building, repairing or breaking of any vessel, the Fifth Circuit held that his job constructing scaffolds for port purposes was maritime employment. *Id.*, 650 F.2d at 755.

If the construction of scaffolds to be used in a shipyard is deemed maritime employment, then clearly the construction of a power plant which runs the entire shipyard must be deemed maritime employment. It follows that Mr. Prevetire's work as a welder in constructing the power plant at the Norfolk Naval Shipyard would be "maritime employment" under the Fifth Circuit's standard in *Hullinghorst*. To hold otherwise creates a clear conflict.

The decision of the court of appeals in the present

case is inconsistent with the decisions from both the First Circuit and Fifth Circuit, and creates a conflict which must be clarified by this Court.

3. The decision of the court of appeals is in conflict with its own decisions in *Stewart/Joyner*, *Price*, and *Simonds*.

The Fourth Circuit clarified the status requirement in *Stewart v. Brown and Root, Inc.*, 7 BRBS 356 (1978), *aff'd. sub nom. Brown v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980). In that case, it was held that:

> For future application of the "status" test, at least those persons directly involved in the **construction**, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships) will be deemed "harborworkers" within the meaning of Section 2(3) of the Act.
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> 7 BRBS at 365 (emphasis supplied).

In *Stewart/Joyner*, Newport News Shipbuilding & Dry Dock Company contracted Brown & Root, Inc., an

independent contractor, to construct an addition to the shipyard. The project included the construction of an administration building, a fabrication shop, a permanent dry dock, and other related areas such as craneways and assembly areas. The claimants in that case, Brown & Root employees, were involved in the construction of the new part of the shipyard and the Fourth Circuit concluded that their work met the "status" requirement of the Act. *Id.*, 607 F.2d at 1090. The decision in *Stewart/Joyner* compels a conclusion that since Prevetire was involved in the construction of a shipyard facility critical to the entire shipyard repair process, specifically the power plant, he should have "status" within the meaning of Section 2(3) of the LHWCA.

It is noteworthy that the court of appeals did not even address its prior decision in *Stewart/Joyner* in reaching its

conclusion in the present case.[6] Perhaps the reason for the court of appeals failing to consider its own decision in *Stewart/Joyner* is the fact that the decision in the present case is irreconcilably in conflict with *Stewart/Joyner*.

The Fourth Circuit specifically held in *Stewart/Joyner* that "both Stewart and Joyner satisfy the status test because they were engaged in maritime employment while they worked to **construct** the dry dock". 607 F.2d. at 1090 (emphasis supplied). In that case, claimant Stewart worked in numerous areas throughout the construction project, and was injured while carrying out his duties as a painter-sandblaster. Claimant Joyner, a general excavation foreman, was killed by a tractor while supervising the loading of sand

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[6] The clear conflict between the *Stewart/Joyner* decision and the decision in the present case was repeatedly pointed out by claimant's counsel, but was simply ignored by the court. In Respondent's Brief filed with the Court of Appeals for the Fourth Circuit on October 4, 1993, the *Stuart/Joyner* decision was offered to the court for evaluation (Respondent Prevetire's Brief at 14). That decision was again offered to the Fourth Circuit for evaluation in Prevetire's "Petition for Rehearing" filed on July 13, 1994 (Brief in Support of Petition for Rehearing with Suggestion for Rehearing *In Banc* at 6-7).

at a reclaiming pit where it had settled after being pumped ashore. The sand was used to grade the expanded part of the shipyard and to backfill the concrete walls of the incomplete dry dock. *Id.*, 607 F.2d at 1089.

If the court of appeals found that an employee involved in the construction of an entire part of a shipyard is covered under the LHWCA, as in *Stewart/Joyner*, then how could that same court rule that an employee who constructs a power plant, which runs the entire shipyard, does not have "status", as in the present case. Yet the court did, creating a clear conflict which must be resolved. The prior decision of *Stewart/Joyner* was simply ignored by the court of appeals in the present case. A petition for a writ of certiorari should be granted in order to resolve the current conflict between the *Prevetire* decision[7] and the *Stewart/Joyner* decision.

The Fourth Circuit's decision in *Price v. Norfolk and*

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[7] *Weyher/Livsey Constructor, Inc. v. Prevetire*, 27 F.3d 985 (1994)

Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980), also conflicts with the court's opinion in *Prevetire*. In *Price*, the claimant was a railroad employee injured while painting a support tower for a gallery belt system used in loading and unloading grain. In holding that Price had met the status requirement of the Act, the Fourth Circuit held:

> We can discern no significant distinction between the repair of machinery essential to the movement of maritime cargo and the painting of a structure essential to the loading and unloading of the same. Nor can we discern any significant distinction between oiling a machine used in building ships, as was the claimant in *Graham*[8], and painting a structure used in loading and unloading ships.
>
> *Price*, 618 F.2d at 1061-1062.

The court's rationale in *Price* is consistent with the Supreme Court's decision in *Schwalb*, *supra*, which held that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are

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[8] *Newport News Shipbuilding & Dry Dock Company v. Graham*, 573 F.2d 167 (4th Cir.), *cert. denied*, 439 U.S. 979, 99 S.Ct. 563, 58 L.Ed.2d 649 (1978).

covered under the Longshore Act.

In the present case, the power plant involved is just as essential to ongoing construction and repair of ships as the machinery involved in *Schwalb* and *Price* was to the loading and unloading process. There is no legal basis for distinguishing between ship repair/construction and ship loading/unloading for purposes of determining "status" under the Longshore Act.

In addition to the conflicts between the present case and the decisions in *Stewart/Joyner* and *Price*, the Fourth Circuit's recent decision in *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122 (1994), is also at odds. In that case, claimant Simonds was injured while working as a pipe welder for Pittman Mechanical Contractors, Inc. The injury occurred on Pier 12 at the Norfolk Naval Operations Base. Pittman Mechanical, an independent contractor, had contracted with the Navy to construct and install pipelines into the pier. The pipelines were used to load fuel, steam

and water onto the vessels when they were docked at the pier. *Id.*, 35 F.3d at 124.

In determining whether Simonds was a covered employee under the LHWCA, the Fourth Circuit used the "integral or essential part" test that was established in *Schwalb*. *Id.*, 35 F.3d at 125-126. Using this standard, the court of appeals determined that Simonds' duties as a pipe welder in constructing and installing pipelines into the pier were integral to the overall process of loading and unloading a vessel. Accordingly, the court concluded that Simonds was engaged in maritime employment. *Id.*, 35 F.3d at 126.

Based upon the Fourth Circuit's opinion in the present case, Pittman Mechanical argued that Simonds was not a "maritime employee" within the meaning of Section 2(3). In response to Pittman's contentions, the court of appeals wrote:

> It is true that this court has ruled that a pipe fitter engaged in the construction of a power plant at a naval shipyard, intended ultimately to produce the

> electricity necessary for the operation of equipment needed for ship-building and ship-repair operations, was not engaged in maritime employment. *Prevetire*, No. 93-1819, 1994 WL 284595, at *3. That tenuated connection with maritime status precluded any finding that the claimant in that case was involved in the "repair[] or [maintenance of] equipment used in the loading or unloading process." *Id.* In the instant case, Simonds was injured while installing and repairing pipelines that transported steam, water, and fuel--supplies essential to the operation of the vessel--from land-based storage facilities over a pier and onto the docked ships. The necessity of these items is demonstrated by the fact that Pier 12 could not be used for docking purposes while the pipelines were out of commission. The transported steam and water were necessary for the ships' proper operation, while the fuel was required for the operation of the aircraft contained on board the carriers. Absent other means of transport, the pipelines serviced by Simonds were the only available method to load the supplies essential to the ships' operation. Hence, Simonds was actually engaged in the installation and repair of equipment necessary for the loading process and, thereby, in maritime employment.
>
> *Id.*, 35 F.3d at 126.

Under the court's rationale in *Simonds*, Mr. Prevetire's duties as a welder must equally be deemed "maritime employment." Similar to the new pipelines installed by Simonds, that would provide steam, water and

fuel to carriers docked at the pier, the power plant constructed by Mr. Prevetire was essential to the overall ship repair operations at the shipyard. As the court noted in *Simonds*, "[a]bsent other means of transport, the pipelines serviced by Simonds were the only available method to load the supplies essential to the ships' operation." *Id.*, 35 F.3d at 126. Likewise, absent other means of operating the Norfolk Naval Shipyard, the power plant constructed by Prevetire was the only available method of power in the entire shipyard, and therefore essential to the shipyard's operations.

Contrary to court's attempt to distinguish the *Simonds* decision from its previous conclusion reached in *Prevetire*, the fact is that the present case on appeal before this Honorable Court is in direct conflict with *Simonds*. Given the rationale proposed by the court of appeals in *Simonds*, one is left to question wherein lies the distinction between *Simonds* and *Prevetire*.

If the court in *Simonds* found a distinction between

employees involved in the loading/unloading of ships and those involved in the ship repair/shipbuilding process, there is absolutely no basis for such a distinction. Both ship loading/unloading and ship repair/shipbuilding are covered activities within Section 2(3) of the LHWCA. Thus, the fact that Mr. Simonds was injured while constructing a device used to load ships does not distinguish him from Mr. Prevetire who was involved in the construction of a facility essential to the ship repairing process.

If, on the other hand, the court in *Simonds* found a distinction between the characterization of the work being performed, whether construction or maintenance/repair, again this distinction is not supported by the LHWCA, the well established case law interpreting the Act,[9] nor by common sense. In fact, both employees were involved in construction

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[9] Indeed, the Fifth Circuit held in *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1220 (1980), that the initial construction of a pier cannot be distinguished from pier repair work for purposes of determining the maritime nature of employment.

projects: Prevetire in constructing a power plant; Simonds in constructing and installing new pipelines for Pier 12. Yet, Simonds was deemed a "maritime employee" and Prevetire was not.

The fact is there is no valid distinction between the situation presented in *Simonds* and that of the instant case. Moreover, if such a distinction was to be drawn, it would be in direct conflict with Fourth Circuit's prior opinion in *Stewart/Joyner*. A clear conflict is created by these two inconsistent decisions and, accordingly, review by this Court is warranted.

If an employee injured while constructing the facilities integral to the overall ship repair process is not covered under the LHWCA, where an employee injured while maintaining those same facilities is covered, then the type of incongruous results sought to be avoided by this Court in *Northeast Marine Terminals Co. v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977), will ensue. This

Court held in *Caputo* that the definition of a "maritime employee" pursuant to Section 2(3) should be liberally construed in favor of the injured employee. *Id.*, 432 U.S. at 268. This Court also emphasized that both the Longshore Act and the 1972 Amendments were remedial in intent and should be read broadly and "in a way which avoids harsh and incongruous results" *Id.*, 432 U.S. at 268, citing *Voris v. Eikel*, 346 U.S. 328, 333, 98 L.Ed. 5, 74 S.Ct. 88 (1953). The decision by the court of appeals in the present case creates a direct conflict with its subsequent decision in *Simonds*. This conflict within the Fourth Circuit is not reconcilable and in order to resolve future "incongruous" results, this petition for a writ of certiorari should be granted.

CONCLUSION

In conclusion, the decision of the court of appeals is in direct conflict with this Court's decision in *Schwalb*, in conflict with the decision of other circuit courts of appeals, and even in conflict with prior and subsequent decisions of the Fourth Circuit. For these reasons, this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1819

WEYHER/LIVSEY CONSTRUCTORS, INC.;
WAUSAU INSURANCE COMPANIES,

PETITIONERS,

v.

THOMAS C. PREVETIRE;
DIRECTOR, O.W.C.P.,
UNITED STATES DEPARTMENT OF LABOR,

RESPONDENTS.

On Petition for Review of an Order
of the Benefits Review Board
(90-1181)

Argued: April 11, 1994
Decided: June 29, 1994

Before MURNAGHAN, Circuit Judge, SPROUSE, Senior Circuit Judge, and HARVEY, Senior United States District Judge for the District of Maryland, sitting by designation.

OPINION

MURNAGHAN, Circuit Judge:

Thomas C. Prevetire was injured on the job and filed a claim for disability benefits under the Longshore and Harbor Workers' Compensation Act ("the LHWCA" or "the Act"), 44 Stat. (part 2) 1424, as amended, 33 U.S.C. §§ 901-950. An administrative law judge denied his claim, but the Benefits Review Board of the United States Department of Labor reversed. The employer now petitions for review of the Board's decision and order.

I

Respondent Prevetire was employed as a pipe fitter by petitioner, Weyher-Livsey Constructors, Inc.,[1] when it was building a power plant on the premises of the Norfolk Naval Shipyard in Portsmouth, Virginia. As the project was originally conceived, all of the steam and most of the electricity produced at the plant would be used at the shipyard for its day-to-day operations, and the surplus electrical power produced at the plant would be sold commercially to consumers outside the shipyard.[2]

While working at the construction site, Prevetire suffered an injury that resulted in a permanent partial disability to the ring finger of his left hand. He notified Weyher-Livsey of his injury and filed a claim for disability

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[1] The other petitioner, Wausau Insurance Co., is the workers' compensation carrier for Weyher-Livsey.

[2] For at least the first year after the plant was built, however, the shipyard used all the electricity and steam produced by the plant.

compensation under the LHWCA. Weyher-Livsey agreed to compensate Prevetire for his disability under the Virginia state workers' compensation act but refused to pay the higher disability compensation benefits that the LHWCA would require.[3]

The administrative law judge (ALJ) issued a decision denying Prevetire's claim on the ground that he was not a "maritime employee" covered by the LHWCA. He found that the skills Prevetire used in building the power plant were not distinctly maritime, and the purpose of his employment lacked "a 'realistically significant relationship to' traditional maritime activity involving navigation and commerce on navigable waters."

Prevetire appealed to the Benefits Review Board. The Board reversed the ALJ's decision on the grounds that its reliance on the "significant relationship" test was invalid in light of the Supreme Court's decision in *Chesapeake & Ohio Railway Co. v. Schwalb,* 493 U.S. 40 (1989), and that its reliance on the absence of a maritime character of the "skills used" was also erroneous because nonmaritime skills applied to a maritime purpose constitute maritime employment. The Board also held that building structures and machinery for shipyard work is an "essential element" of building and repairing ships, and that the construction of the power plant was essential to the shipyard's operations, including shipbuilding and ship repair work, and thus constituted "maritime employment" under the Act. Weyher-Livsey timely petitioned for review of the Board's decision.

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[3] There was no dispute as to *medical* benefits: Weyher-Livsey, as the employer, provided all medical benefits to which Prevetire would have been entitled under the LHWCA, 33 U.S.C. § 907.

II

A

The Supreme court has stated that the Benefits Review Board is not a policymaking agency and therefore its interpretations of the LHWCA are entitled to no special deference from the Courts of Appeals. *See Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs,* 449 U.S. 268, 278 n.18 (1980).

In the present case, the Solicitor of Labor has filed a brief on behalf of the Director of the Office of Workers' Compensation Programs of the Department of Labor (the "Director"), who, as one of the respondents here, supports Prevetire's broad interpretation of the Act. We do afford deference to the Director's interpretation of the LHWCA because he has policymaking authority with regard to the Act. *See Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.,* 8 F.3d 175, 179 (4th Cir. 1993) ("[W]e should respect a reasonable interpretation of the LHWCA by the Director.... Absent clear congressional intent as to the proper construction of the LHWCA, we must give deference to the Director's reasonable and permissible interpretation."); *Zapata Haynie Corp. v. Barnard,* 933 F.2d 256, 258-59 (4th Cir. 1991) ("[T]his court defers to [the Director's] interpretation [of the LHWCA] unless it is unreasonable or contrary to Congressional intent."); *Newport News Shipbuilding & Dry Dock Co. v. Howard,* 904 F.2d 206, 208-09 (4th Cir. 1990); *cf Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984).

As we explain below, the Director's construction of

the LHWCA in the present case is both unreasonable and contrary to Congress' clear intent, as expressed in the Act's text and structure. In such a case, our duty is to enforce the will of Congress, notwithstanding the Director's interpretation.

B

The LHWCA creates a comprehensive federal scheme to compensate a broad range of land-based maritime workers who are injured or killed on the job. *See Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2592 (1992); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991). Before 1972 the LHWCA covered only workers injured on the actual "navigable waters of the United States (including any dry dock)." 44 Stat. (part 2) 1426. The 1972 Amendments to the LHWCA extended the Act's coverage by replacing what had been a rather restrictive "situs" test of eligibility for compensation with a broader "situs" test that allows compensation for any "employee" whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a).

"[W]ith the definition of 'navigable waters' expanded by the 1972 Amendments to include such a large geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264 (1977); *accord Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 317 (1983). Specifically, Congress added a "status" test restricting the Act's coverage to "person[s]

engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. § 902(3). Clauses (A) through (H) of § 902(3) enumerate several categories of persons who are expressly *not* covered "employees," such as clerical workers and persons employed by waterfront restaurants, retail stores, and museums. *Id* § 902(3)(A)-(H).[4] To be eligible for compensation, a person

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[4] Section 902(3) provides, in full:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include --
>
> > (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
> >
> > (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
> >
> > (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
> >
> > (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of a [maritime] employer . . . , and (iii) are not engaged in work normally performed by employees of that employer under [the Act];
> >
> > (E) aquaculture workers;
> >
> > (F) individuals employed to build, repair, or dismantle

must be an employee as defined by § 902(3) who sustains an injury on the situs defined by § 903(a). *See Schwalb,* 493 U.S. at 45. The requirements of §§ 902(3) and 903(a) are liberally construed to favor coverage under the LHWCA. *See Caputo,* 432 U.S. at 268.

In the present case, there is no dispute that the situs test is satisfied. The sole disputed issue is whether Prevetire, a shipyard power-plant construction worker, was a "person engaged in maritime employment" within the meaning of § 902(3). Although the statute expressly provides a few examples of a "person engaged in maritime employment" -- a longshoreman, a ship repairman, a shipbuilder, and so forth -- it sets forth no general definition of "maritime employment."

The Supreme Court has repeatedly held that, aside from the occupations specifically named in § 902(3), "land-based activity occurring within the § 903 situs will be deemed maritime *only if it is an integral or essential part of loading or unloading a vessel." Schwalb,* 493 U.S. at 45-46 (emphasis added) (citing three Supreme Court precedents). In

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any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

Indisputably, Prevetire fell within none of the exclusions specified in clauses (A) through (H) of § 902(3), so it remains necessary to decide whether he was "engaged in maritime employment."

Schwalb, the Court held "that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act" because they "are engaged in activity that is an integral part of and essential to those overall processes." *Id.* at 47.

C

The respondents in the present case (Prevetire and the Director) invite us to extend *Schwalb* by holding that a pipe fitter who was employed in only the *construction* of a power plant (as distinguished from its later operation or maintenance) was engaged in activity that was an integral or essential part of loading or unloading a vessel and hence was "engaged in maritime employment" *simply because the power plant being built would eventually provide steam and electricity to shipbuilding and ship-repair operations.* Because such an expansive view of maritime employment is inconsistent with the LHWCA and its 1972 Amendments, as interpreted in a long line of Supreme Court decisions, we decline respondents' invitation, grant Weyher-Livsey's petition, and reverse the Benefits Review Board's decision.

Justice White, writing for the Court in *Herb's Welding, Inc. v. Gray,* 470 U.S. 414 (1985), explained that the 1972 Amendments'

> expansion of the definition of navigable waters to include rather large shoreside areas necessitated an affirmative description of the particular employees working in those areas who would be covered. This was the function of the maritime employment requirement. But Congress did not seek to cover all those who breathe salt air.

Id. at 423. Justice White's opinion for the Court went on to hold that Robert Gray, the LHWCA claimant, was not "engaged in maritime employment," within the meaning of § 902(3). *Herb's Welding*, 470 U.S. at 427.[5]

Prevetire's claim is significantly weaker than Gray's claim, which the Court rejected. Both Gray and Prevetire were construction workers: Gray was a welder who built and replaced pipelines, Prevetire a pipe fitter who helped build and replace a power plant. Neither man built or repaired ships. Neither man loaded or unloaded ships. Neither man repaired or maintained equipment used in the loading or unloading process. Gray's welding work and Prevetire's pipe fitting were both far removed from traditional LHWCA activities, such as longshoring. Neither welding nor pipe fitting is an inherently maritime task. Both jobs are also performed on land, and their nature is not significantly altered by the marine environment. *Compare Herb's Welding,* 470 U.S. at 416, 425.

Gray, however, worked on a fixed *offshore* oil-drilling platform. He commuted to and from his workplace by boat and even loaded and unloaded his welding gear onto a boat. He regularly traveled back and forth over water among the rigs in the oil field. And he frequently faced the notorious maritime hazards associated with offshore rigs. *See id.* at 428-50 (Marshall, J., dissenting). In short, Gray did "far more than just 'breathe salt air.'" *Id.* at 449 (quoting the majority opinion, 470 U.S. at 423). Yet Gray was held not qualified for LHWCA benefits.

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[5] In *Herb's Welding*, as in the present case, the Director participated as a respondent and argued for a broad interpretation of § 902(3).

The maritime activities of Prevetire, on the other hand, barely extended beyond "breathing salt air." Indeed, the only connection between his occupation and maritime activity was the one highlighted by the respondents: power from the plant that Prevetire helped to build would eventually be used by the shipyard. Obviously, if the plant had been built just outside the shipyard's boundary rather than just inside it (or if the electricity generated by the plant had been consumed outside the shipyard), Prevetire's job would not have changed one iota.[6]

The nature of a particular job is, of course, defined in part by its location, *see Herb's Welding,* 470 U.S. at 426; but to classify Prevetire's employment as maritime, merely because the power plant that he was helping to construct would lie on the seaward side of the shipyard's boundary, would blur together the "situs" and "status" requirements which Congress intended to make distinct. Indeed, it is difficult to imagine how any employee working full-time at the Norfolk Naval Shipyard could be deemed *non*-maritime if Prevetire, the shipyard power-plant builder, were classified as a maritime employee. Thus, the respondents' suggested construction of the LHWCA would effectively read the "status" requirement out of the Act. *Cf id.; Humphries v. Director, Office of Workers' Compensation Programs,* 834 F.2d 372, 375 (4th Cir. 1987) ("Were we to read the ... requirement so broadly as to embrace this claim, ... we would come perilously close to eliminating it entirely."), *cert. denied,* 485 U.S. 1028 (1988). Because Congress did

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[6] Respondents' argument is further weakened by the fact that the power plant was not even dedicated to shipyard purposes: it was also designed for produce surplus electricity that could be sold to Virginia Power and used commercially by consumers throughout southeastern Virginia.

not intend to extend LHWCA coverage to every employee who works at a shipyard regardless of whether the work is maritime employment, Prevetire was not covered, for we hold that he was not "engaged in maritime employment" within the meaning of the Act, 33 U.S.C. § 902(3).

III

We grant the employer's petition for review, set aside the decision and order of the Benefits Review Board, and deny Prevetire's claim for disability benefits under the LHWCA. His workers' compensation rights under Virginia law will not be adversely affected.

REVERSED

SPROUSE, Senior Circuit Judge, dissenting:

I respectfully dissent. I agree with the majority that the sole dispute is whether Prevetire was a "person engaged in maritime employment" within the meaning of 33 U.S.C. § 902(3). In my view, however, a proper reading of *Chesapeake & Ohio R. Co. v. Schwalb,* 493 U.S. 40 (1989), requires a holding that Prevetire was engaged in maritime work.

As the majority points out, the *Schwalb* Court, in discussing employees who maintained and repaired equipment essential to the loading or unloading process, held that such employees are covered by the Act because they "are engaged in activity that is an integral part of and essential to those overall processes." *Schwalb,* 493 U.S. at 47. In my view, the construction of a power plant at the shipyard is also essential to the shipyard's maritime operations, for without electricity and steam, no shipbuilding or repair work could

be performed. Prevetire's construction work on the power plant, therefore, was a link in the shipbuilding and ship repair process that was just as essential as the maintenance and repair of machinery used in that process. For this reason, I believe the majority's reliance on *Herb's Welding, Inc. v. Gray,* 470 U.S. 414 (1985), is misplaced. There, the decision denying coverage turned on the Court's view that neither the offshore search for oil and gas, nor the oil industry's use of offshore platforms in that process, had any relation to one of the Act's primary purposes--the protection of shipyard workers whose activities affect the loading or unloading of ships. Here, however, the furnishing of electrical power is closely related to maritime work performed in the shipyard.

My colleagues recognize, as they must, that §902(3)'s definition of maritime employees is to be liberally construed. *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 248,268 (1977). The rule may very well be one which is often employed by judicial writers, perhaps including the present dissenter, when it matches their already matured decisions. Nonetheless, I believe that the issue of coverage *vel non* in this case is at least a close issue where the liberality rule would tilt the balance in favor of coverage.

In a similar vein, contrary to the majority, I would defer to the legal position of the Director, maintained since at least 1977, that construction work of this type is covered maritime employment. *See* LHWCA Program Memorandum No. 58, United States Dept of Labor (Aug. 10, 1977). Congress has not spoken directly on the issue we consider, and one must wonder why, if the textual structure of the Act is so clear, the Supreme Court needed to go to such lengths in *Schwalb* and *Gray* to interpret Congress' intent regarding whether employees in divergent circumstances are maritime

employees.

In my view, the Supreme Court's decision in *Schwalb* is broad enough to support the Director's view. Furthermore, there have been divergent results in decisions of the circuit courts of appeals on parallel issues. These factors along with the congressional silence on the meaning of § 902(3) as it relates to construction work on shipyard facilities make it difficult for me to accept that the Director's position is unreasonable.

APPENDIX B

FILED: October 26, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1819
(90-1181)

WEYHER/LIVSEY CONSTRUCTORS, INCORPORATED; WAUSAU INSURANCE COMPANIES,

Petitioners,

versus

THOMAS C. PREVETIRE; DIRECTOR OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ORDER

Respondents have each filed a petition for rehearing with suggestion for rehearing in banc and petitioners filed an

answer to the petitions.

Senior Judge Sprouse voted to grant rehearing. Judge Murnaghan and Judge Harvey, Senior United States District Judge, sitting by designation, voted to deny.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Wilkins, Williams, Michael and Senior Judge Sprouse voted to rehear the case in banc. Chief Judge Ervin, Judges Russell, Widener, Hall, Murnaghan, Wilkinson, Niemeyer, Hamilton, Luttig and Motz voted against rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Murnaghan for the Court.

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX C

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB No. 90-1181

THOMAS C. PREVETIRE,
Claimant-Petitioner,

v.

WEYHER/LIVSEY CONSTRUCTORS, INC.,

and

WAUSAU INSURANCE COMPANY,

Employer/Carrier-Respondents

DECISION AND ORDER

DATED ISSUED: May 12, 1993

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, and McGRANERY, Administrative Appeals Judges.

STAGE, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (89-LHC-1851) of Administrative Law Judge Michael P. Lesniak denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Employer is in the business of constructing small power plants, and it was the general contractor on a project to build a power plant at the Norfolk Naval Shipyard from 1984-1988 as a replacement for the old oil-burning plant. The power plant is a co-generation plant,[1] producing both electricity and steam for the shipyard. The waste used as fuel for the plant is "produced" at a solid waste facility run by a state agency across the street from and outside the boundaries of the shipyard. It was intended that two-thirds of the electricity and all of the steam produced would be used by the shipyard, and that the remaining one-third of the electricity would be sold to Virginia Power. As of November 1989, however, the shipyard was using all the electricity and steam produced by the plant.

The parties stipulated, *inter alia,* that claimant sustained an injury in the course of his employment on October 16, 1986, resulting in a 22 percent permanent

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[1] A co-generation plant uses more than one type of fuel. This particular plant uses refuse-derived fuel as its primary source, and oil and coal are its back-up fuels.

impairment of the left ring finger, and that claimant has received compensation under the Virginia workers' compensation statute. The parties further stipulated that at the time of injury claimant was employed as a pipefitter in the construction of the power plant on the grounds of the Norfolk Naval Shipyard. The only issues presented for the administrative law judge's resolution were whether claimant's employment satisfies the status and situs requirements of the Act. 33 U.S.C. §§902(3), 903(a) (1988). The administrative law judge concluded that the situs test was met, but that the status test was not. The administrative law judge found that claimant's job was not inherently maritime as it involved tasks identical to those performed by employer's pipefitters welding on "non-maritime" power plant projects. The administrative law judge further stated that claimant's employment does not have a realistically significant relationship to traditional maritime activities involving navigation and commerce on navigable waters. Thus, the administrative law judge denied benefits under the Act.

On appeal, claimant contends that the administrative law judge erred in concluding that the status test is not met. Claimant contends that the construction of a facility for use at the shipyard is analogous to the maintenance and repair of shipyard buildings, which is covered employment, and that the administrative law judge erred in focusing on whether claimant's trade is inherently maritime as opposed to whether the structure being constructed has a maritime purpose. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

Section 2(3) of the Act states:

> The term "employee" means any person engaged in maritime employment, including

> any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker....

33 U.S.C. §902(3) (1988). We hold that the administrative law judge applied improper standards in determining whether claimant is engaged in maritime employment, and we reverse his finding that claimant is not covered under the Act.

Initially, the administrative law judge's reliance on the 'realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters" test is misplaced in light of the decision of the United States Supreme Court in *Chesapeake & Ohio Ry. Co. v. Schwalb,* ___U.S.___ 110 S.Ct. 381, 23 BRBS 96(CRT) (1989). In *Schwalb*, the claimant was engaged in maintenance and janitorial work, including the cleaning of conveyors used in the loading process. The court stated that the proper focus is on whether the activity is an "essential element" of loading or unloading, not whether it is a "traditional maritime activity," and that the claimant's work was essential to this process. *Id.; see also Atlantic Container Service, Inc. v. Coleman,* 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990); *Coloma v. Director, OWCP,* 897 F.2d 394, 23 BRBS 136 (CRT)(9th Cir. 1990). Similarly, in finding coverage for a shipyard maintenance worker, the United States Court of Appeals for the First Circuit stated that "[t]he maintenance of the structures housing shipyard machinery and in which shipbuilding operations are carried on is no less essential to shipbuilding than is the repair of the machinery itself." *Graziano v. General Dynamics Corp.,* 663 F.2d 340, 342-343, 14 BRBS 52, 56 (lst Cir. 1981). *See also Price v. Norfolk & Western Ry. Co.,* 618 F.2d 1059 (4th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co. v. Graham,* 573

F.2d 167, 8 BRBS 241 (4th Cir. 1979), *cert. denied,* 439 U.S. 979 (1978); *Hawkins v. Reid Associates*, 26 BRBS 8 (1992). Thus, the proper inquiry in this case is whether claimant's employment is essential to the shipbuilding operation.

Moreover, whether claimant's pipefitting duties are "inherently maritime" is irrelevant if the purpose of the work being performed is related to shipbuilding, In *Hullinghorst Industries, Inc. v. Carroll,* 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982), the United States Court of Appeals for the Fifth Circuit deemed it "immaterial" that the skills used by the employee are essentially non-maritime in character if the purpose of the work is maritime. The court stated: "'non-maritime' skills applied to a maritime project are maritime for purposes of the 'maritime employment' test of the Act."[2] *Id.*, 650 F.2d at 756, 14 BRBS at 377 (emphasis in original). The fact that the nature of claimant's duties is not altered by a maritime environment therefore does not prevent a finding of coverage under Section 2(3). *See generally White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980); *Jackson v. Atlantic Container Corp.*, 15 BRBS 473 (1989).

Applying this law to the facts in the instant case, we hold that claimant's employment is covered under Section 2(3) of the Act. The construction of a power plant at the shipyard is essential to the shipyard's operation, for without electricity and steam no shipbuilding and repair work can be

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[2] In *Hullinghorst*, the claimant worked for a sub-contractor at a port facility as a scaffolding carpenter. He constructed scaffolding for whatever purpose the port needed but he did not participate directly in the loading, unloading, building, repair or breaking of any vessel.

performed. *See Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991). In *Hawkins*, 26 BRBS at 8, the Board affirmed a finding of coverage for a claimant engaged in the removal of old and the installation of new underground utility lines at the same shipyard as in the instant case. As in the instant case, the claimant in *Hawkins* was not an employee of the shipyard, but was employed in construction work on a subcontracts.[3] The Board stated that claimant's work was a link in the shipbuilding process, citing *Graziano*, 663 F.2d at 340, 14 BRBS at 52. Herein, claimant's construction work on a power plant also is a link in the shipbuilding and ship repair process that is just as essential as the maintenance and repair of the machinery used in the shipbuilding process. *Graziano*, 663 F.2d at 342-343, 14 BRBS at 56. It is not material to the outcome of this case that the shipbuilding and repair process would not have stopped without the construction of a new power plant. *See Price*, 618 F.2d at 1062 n.4. It is sufficient that the purpose of the new plant is maritime in nature, *i.e.*, to supply electricity and steam to the shipyard for its operations. Thus, we reverse the administrative law judge's finding that claimant's employment does not satisfy the status test of Section 2(3). Inasmuch as the parties stipulated that claimant has a 22 percent impairment of the left ring finger, we, hold that claimant is entitled to benefits under Section 8(c)(10), (19) of the Act, 33 U.S.C. §908(c)(10), (19). Per the parties' stipulation, employer is entitled to a credit for payments made under the state act pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e) (1988).

Accordingly, the administrative law judge's Decision

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[3] In *Hawkins*, 26 BRBS at 8, the claimant was a heavy equipment operator on a subcontract to remove and install utility lines underground and in a nuclear submarine repair facility under construction.

and Order denying benefits is reversed, and claimant is entitled to benefits as stated herein.

SO ORDERED.

\s\ Betty J. Stage
BETTY J. STAGE,
Chief Administrative Appeals Judge

I concur:

\s\ Regina C. McGranery
REGINA C. McGRANERY,
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to reverse the administrative law judge's finding that claimant's employment did not satisfy the status test of Section 2(3) of the Act, 33 U.S.C. §902(3)(1988). I agree that the administrative law judge applied the wrong law in determining whether the status test is met. Specifically, he erred in relying on the fact that claimant's work was not "inherently maritime." *See Hullinghorst Industries Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir, 1981), *cert. denied*, 454 U.S. 1163 (1982); *see generally Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985). Furthermore, the administrative law judge did not determine if claimant's work is "essential" to the shipbuilding and repair operation carried on at the shipyard. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, ___U.S.___, 110 S.Ct. 381, 23 BRBS 96(CRT) (1989); *Hayes v. CSX Transportation, Inc.*, 985 F.2d 137 (4th Cir. 1993).

Moreover, the administrative law judge did not consider whether the cases dealing with the repair of shipyard buildings are applicable to the facts of this case. *See, e.g., Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (lst Cir. 1981). Given these errors and omissions on the part of the administrative law judge, I would vacate the administrative law judge's finding that claimant's employment did not satisfy the status test, and remand the case for the administrative law judge to apply the facts of this case to the appropriate law.

\s\ Nancy S. Dolder
NANCY S. DOLDER,
Administrative Appeals Judge

APPENDIX D

[SEAL]

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 201 -- 55 West Queens Way
Hampton, Virginia 23669
804-722-0571

CASE NO.: 89-LHC-1851
OWCP NO.: 5-67904

In the Matter of

THOMAS C. PREVETIRE,
Claimant,

v.

WEYHER/LIVSEY CONSTRUCTORS, INC.,
Employer,

and

WAUSAU INSURANCE COMPANY,
Carrier.

Appearances:
Robert E. Walsh, Esq.
For the Claimant
Daniel R. Lahne, Esq.
For the Employer
Before: MICHAEL P. LESNIAK
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for disability compensation filed by Thomas C. Prevetire pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Section 901 et seq.

A formal hearing was held in Hampton, Virginia on December 4, 1989, at which all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations,

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.[1]

Stipulations

1. An employer/employee relationship existed at all relevant times.

2. The Claimant sustained an injury arising out of and in the course of his employment on October 16, 1986.

3. Claimant gave timely notice of the injury to the Employer.

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[1] The following citations to the record are used herein:

EX - Employer's Exhibit
TR - Transcript of the Hearing

Findings refer to the number findings in this decision.

4. Claimant filed a timely claim for compensation under the Longshore and Harbor Workers' Compensation Act.

5. Medical benefits have been provided in accordance with Section 7 of the Act.

6. The Employer/Insurer filed a timely notice of controversion.

7. The Claimant was a pipe fitter on the construction of the steam generator plant within the grounds of Norfolk Naval shipyard at the time of his injury.

8. Claimant sustained a 22 percent permanent partial disability to the ring finger of his left hand as a result of the October 16, 1986 accident.

9. The plant, when operational, would supply power to the shipyard.

10. Claimant's average weekly wage at the time of the injury was $528.29.

11. If jurisdiction under the Longshore Act is found, the Employer/Insurer is entitled to a credit for compensation paid under the State Act. (TR 3-5).

Issue

I. Whether the Claimant's injury sustained on October 16, 1986 is subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

Findings of Fact and Conclusions of Law

Claimant's Testimony

Claimant waived testifying at the hearing (TR 9) in light of the stipulations of record.

Testimony of Larry J. Howell

Larry J. Howell testified on behalf of the Employer as follows:

Howell testified that he is president of Weyher/Livsey Constructors, Inc., 8601 Dunwoody Place, Suite 530, Atlanta, Georgia. (EX 12, p. 5). As president, Howell has responsibility for overall operations of the company. He has spent a little over 18 years with various units of engineering construction field.

The steam generating plant at Norfolk Naval Shipyard was a joint venture with Dravo Corporation, Weyher/ Livsey's parent company and Sirrine, the engineer of record. (EX 12, p. 7). The Employer herein was the general contractor, Howell is familiar with the steam plant which began construction in mid 1984. He has had occasion to visit the site many times. At the time the Employer was awarded the project and during the course of its construction, Weyher/Livsey Constructors had at least 4 other power plant type projects underway: one was a hydroelectric facility in Boise, Idaho, another was a co-generation facility at Red River Army Depot in Texarkana, Texas, the third was a combined fuel cogeneration facility in Florence, South Carolina and fourth was a garbage burning facility for Regional Waste Systems in Portland, Maine. The same skills would be used to construct the facility at Norfolk Naval

Shipyard as to construct any other facility. It was not affected by the fact that it was on the grounds of the Shipyard. (EX 12, p. 10).

On cross-examination, Mr. Howell testified that the plant generates electricity which was used for the Shipyard's administrative offices, and ship repair operations. (DX 12, pp. 19 and 20),

On re-direct, Howell testified that to his knowledge the work of his employees at the Shipyard plant did not differ from the work of his employees at the other plants because the plant lay in proximity to navigable waters. (DX 12, p. 21).

Testimony of Durwood Curling

Durwood Curling testified on behalf of the Employer as follows:

Curling is the Executive Director of the Southeastern Public service Authority of Virginia which is a political subdivision of the State of Virginia. Its function is to accept from and manage the disposal of the municipal solid waste in 8 communities in South Hampton Roads. Southeastern Public Service Authority owns and operates a municipal solid waste processing plant in the City of Portsmouth. One of the purposes of the plant is to produce fuel for a power plant located on Norfolk Naval Shipyard property. The original study called for the agency to own and operate both facilities: the waste processing plant and the power plant which would produce steam and electricity for the Shipyard. In the summer of 1980, the Navy made a decision that rather than having the State agency build both sides of the project, the Navy would build, own and operate the power plant and they

would purchase fuel from the agency. In 1984, the agency entered into a contract with the Navy which set forth the structuring of the project. The steam plant operated by the Navy and the agencies trash processing plant which produces the fuel are currently located on two separate sites approximately 1000 feet apart. (DX 2, p. 8). The plant has design capabilities of burning 500,000 tons per year of refuse-derived fuel of processed garbage. In 1988, the plant burned less than 200,000 tons. The plan is for the agency to take over the plant and increase its use up to its designed capacity and help with the solid waste disposal problem.

Jurisdiction

In order for a claimant to establish jurisdiction under the Act the Claimant must satisfy a two part test. The Claimant must establish: (1) that he was injured while working on a covered maritime situs within Section 3(a) of the Act and (2) that his status was that of a maritime employee within Section 2(3) of the Act. P.C. Pfeiffer Co., Inc., v. Ford, 444 U.S. 69, 11 BRBS 320 (1979); Northeast Marine Terminals Co., Inc, V. Caputo, 432 U.S. 249, 6 BRBS 150 (1977).

At the time of his injury, Claimant was employed by Weyher/Livsey in the construction of the steam generation plant located within the boundaries of Norfolk Naval Shipyard. (See Stipulation of Parties). I find that the plant's location at Norfolk Naval Shipyard qualifies as a maritime situs for the purposes of the Longshore Act.

Turning to the second part of the jurisdictional test, status as a maritime employee, the Act provides:

The term "employee" means any person

> engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship breaker . . .
>
> 33 U.S.C. §902(3)

"Maritime Employment" is not defined by the Act, but the Supreme Court has held the term to require an occupational test focusing on loading and unloading. Herb's Welding, Inc. v. Gray, 105 S.Ct. 1421, 1427 (1985) (citing P.C. Pfeiffer Company, Inc. v. Ford, 444 U.S, 69, 80 (1979)). The Act sets forth a test for situs under §3(a), 33 U.S.C. §903(a), and a test for status under §2(3), 33 U.S.C. §902(3), both of which must be satisfied for claim to come within the jurisdiction of the Act. See, P.C. Pfeiffer Company, Inc. v. Ford, supra. The §2(3) status requirement provides part of the basis for the Administrative Law Judge's and the Benefit Review Board's subject matter jurisdiction.

In Sedmak v. Perini North River Associates, 9 BRBS 378, BRB Nos. 77-896 et al. (1979), rev'd on other grounds Fusco v. Pereni North River Associates, 601 F.2d 659, 10 BRBS 624 (2d Cir. 1979), vacated and remanded, 100 S. Ct. 697 (1980), aff'd on remand No. 79-4006 et al., 12 BRBS 328 (2d Cir. June 4, 1980), the Benefits Review Board concluded that a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be considered maritime employment under §2(3). The Supreme Court had held in Northeast Marine Terminal Co., v. Caputo, 432 U.S. 249, 267 (1977) that to be covered under the Act, a worker on the situs must be engaged in the overall process of loading or

unloading vessels and spend, at least some of his time, in indisputable longshore operations. In applying these standards, the courts have looked to the employee's regularly assigned job duties as a whole to determine whether "some" of his time is spent in indisputable longshore operations. Malone v. Howard Fuel Company, 16 BRBS 364 (1984); Levins v. Benefits Review Board, U.S. Department of Labor, 724 F.2d 4, 16 BRBS 24(CRT); Schwabenland v. Sanger Boats, 683 F.2d 309 (9th Cir. 1982), cert. denied, 103 S. Ct. 814 (1983).

A number of court decisions have noted that the test of status under the Act is an occupational one.

> . . . The Act focuses primarily on occupation - longshoreman, harbor worker, ship repairman, ship builder, ship breaker. Both the text and history demonstrate a desire to provide continuous coverage throughout their employment to those amphibious workers who, without the amendments, would be covered for only part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen" it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the amendments, would be covered for only part of their activity.

Conti v. Norfolk and Western Railway Co., 566 F.2d 890, 895 (4th Cir. 1977) (citing Northeast Marine Terminal Co., Inc. v. Caputo, supra.

According to the Court in Conti, in order to be

covered under the LHWCA for injuries sustained while on land, the injured employee' s work must have a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" Id. at 895. The courts have recognized that even in those cases in which a worker "spent some portion of his time in indisputable longshoring activities," the time spent may be so minimal or irregular as to not afford status jurisdiction under the Act. See, e.g., Lavillette v. Regan Equipment, 20 BRBS 301, 304-305 (ALJ, 1987); Foret v. Dolphin Services, 19 BRBS 156, 166 (ALJ, 1986). See also, Henry v. Gentry Plumbing and Heating Co., 18 BRBS 95 (BRB 1986).

I find from the evidence summarized above that Claimant's mission was the construction of the power plant and when that job was completed, Claimant would move on to another location not necessarily on shipyard premises. He was not even a power plant worker in the sense that he was an integral part of supplying electrical power.[2] Claimant delivered (constructed) the wherewithal (plant) so someone else could supply electrical power. His involvement in the construction of a power plant does not qualify as having "a realistically significant relationship to traditional maritime activities involving navigation commerce on navigable waters," Conti, supra, at 895. Claimant's pipefitting job was not inherently maritime, it involved tasks which were identical to those performed by Weyher/Livsey pipe fitters working on other power plant projects that had no connection to maritime commerce, and the nature of claimant's tasks were not altered by the maritime environment. There was nothing uniquely maritime about Claimant's pipefitting work and he could just as easily have been working on a power

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[2] I don't mean to imply that if Claimant was a power plant worker there would be jurisdiction.

plant under construction for any other industrial customer. If Claimant's job qualified as a maritime activity, than (sic) so would the workers at the trash processing plant only 1,000 feet away.[3]

Conclusion

The above considered, I find that Claimant's injury sustained on October 16, 1986 is not subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

Attorney Fees

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case the Act prohibits the charging of any fee to the claimant for representation services rendered to him in pursuit of his claim.

ORDER

IT IS ORDERED that Thomas C. Prevetire's claim for disability benefits under the Longshore and Harbor Workers' Compensation Act is hereby denied.

\s\ Michael P. Lesniak
MICHAEL P. LESNIAK
Administrative Law Judge

MPL/lkw
Dated: March 28, 1990
Hampton Virginia

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[3] But for the situs requirement.

APPENDIX E

STATUTORY PROVISIONS

The Longshore and Harbor Workers' Compensation Act, as codified at 33 U.S.C §§ 901 *et seq.*, provides in full part:

§ 902(3) The "status" criterion

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include --
>
> > (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
> >
> > (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
> >
> > (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
> >
> > (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of a [maritime] employer . . . , and (iii) are not engaged in work normally performed by

employees of that employer under [the Act];

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3) (1988).